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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHRISTINE O'BRIEN,

Plaintiff and Appellant,

v.

HASBRO, INC.,

Defendant and Respondent.

B247434

(Los Angeles County  
Super. Ct. No. BC438958)

APPEAL from an order of the Superior Court of Los Angeles County.

John Shepard Wiley, Jr. Affirmed.

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The Rossbacher Firm, Henry H. Rossbacher, and Jeffrey Alan Goldenberg for  
Plaintiff and Appellant.

Kilpatrick Townsend & Stockton, Emil W. Herich, and Dennis L. Wilson for  
Defendant and Respondent.  
\_\_\_\_\_

Christine O'Brien filed suit against Hasbro, Inc., seeking to represent a class of purchasers of a particular Tinkertoy construction set (the Set) manufactured by Hasbro. O'Brien alleged that the Set's packaging falsely indicated that the Set contained certain items (a particular connector piece and a "design guide"), and she sought to hold Hasbro liable for unfair competition and false advertising. The superior court denied her motion for class certification, and O'Brien timely appealed. We affirm.

### BACKGROUND

In her operative second amended class action complaint, O'Brien alleged that she purchased the Set through Amazon.com. The Set is sold in a cylindrical container, and the allegedly misleading representations at issue are displayed on a label that wraps 360 degrees around the cylinder. The label displays pictures of five models made from Tinkertoy pieces, and the label also refers to an "enclosed design guide." The label also bears a disclaimer stating, "Some pictures show pieces not included with this set."

O'Brien alleged that "the models pictured on the packaging . . . [cannot] be constructed with the pieces contained in the Set" and that "there is no design guide enclosed in the Set." She also alleged that the disclaimer (stating that "[s]ome pictures show pieces not included with this set") is "false and misleading" because "none of the pictured models" can be constructed using only pieces contained in the Set. She alleged claims for false advertising and unfair competition on behalf of a putative class of "[a]ll persons residing in California who purchased [the Set] in California within four (4) years prior to the filing of the first Complaint in this action," which was filed in June 2010.

O'Brien moved to certify the class defined in the second amended complaint. Hasbro opposed the motion on numerous grounds. Both parties submitted declarations, deposition excerpts, and other exhibits in support of their positions. Hasbro filed written objections to some of O'Brien's evidence, but the record on appeal does not indicate that O'Brien objected to any of Hasbro's.

According to Hasbro's uncontradicted evidence, during the class period Hasbro sold the Set through only two authorized retailers, Sam's Club and Toys "R" Us.

O'Brien purchased the Set not from one of those authorized retailers but from one of several online resellers. Hasbro's uncontradicted evidence showed that the images of the product packaging displayed by online resellers varied from one reseller to another and in general did not permit a complete view of the entire label that wraps 360 degrees around the Set's cylindrical container. All of the online resellers displayed images depicting at least some of the five models shown on the Set's label, but some online resellers did not display the part of the label referring to the design guide, and some online resellers did not display the part of the label bearing the disclaimer stating that some of the pictures show pieces not included in the Set.

As regards the missing connector piece, the parties' evidence showed (and it appears to be undisputed) that the five models shown on the Set's packaging used a piece that was not included in the set, namely, a "rod to rod connector with a perpendicular through hole." Hasbro also introduced uncontradicted evidence, however, that five models that were visually indistinguishable from those pictured on the Set's packaging could be constructed using only the pieces included in the Set. In addition, Hasbro's uncontradicted evidence showed that, in addition to the disclaimer that "Some pictures show pieces not included with this set," the packaging also bore an accurate list, in both words and images, of every piece included in the Set.

As regards the design guide, the parties do not dispute that the Set's packaging refers to an "enclosed design guide." O'Brien introduced discovery responses in which Hasbro stated that no unit of the Set sold during the class period included a design guide. Hasbro, however, introduced the deposition testimony of a Hasbro employee who stated that (1) Hasbro learned in November 2009 that no units of the Set supplied to Sam's Club contained a design guide, (2) shipments of the Set to Toys "R" Us did not begin until April 2010, (3) Hasbro made sure that all units of the Set shipped to Toys "R" Us included a design guide, and (4) Hasbro's "consumer affairs group" offered a design guide to consumers who called to complain that no design guide was enclosed in the Set. The deposition transcript reflects that, upon hearing the employee's testimony, Hasbro's counsel stated, "I think there's an inaccuracy in some of the discovery responses, as to

the design guide being assessed to Toys R Us, so we'll have to supplement those. Just realized that that's inaccurate."

As to the merits of O'Brien's motion for class certification, Hasbro argued that the motion should be denied because the proposed class was not ascertainable and was overbroad, and because common issues of law and fact did not predominate over individual issues, among other reasons. Hasbro cited five recent Court of Appeal decisions in support of its position.

The superior court denied O'Brien's motion for class certification. The court's order states that "[c]ounsel for both sides declined to hire a court reporter to transcribe the oral argument on this motion, which was lengthy and substantive. At the hearing, counsel made no evidentiary objections or requests for rulings. All objections are waived." The court's order also states that the court asked O'Brien's counsel "to demonstrate how the missing pieces differed from the pieces in the kit" and "to show how the 'substantially identical' projects [built with the pieces included in the Set] differed at all from the pictures on the package. O'Brien's counsel answered neither request." The court further noted that Hasbro's opposition was largely based on five recent Court of Appeal decisions, namely, "*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 220-229; *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 918-929; *Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 631[-]632; *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 978-980; *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1100-1101." The order states that O'Brien's reply in support of her motion "ignores these cases" and that, at the hearing, "the court pressed O'Brien to distinguish or in some manner to discuss these five recent cases. O'Brien adamantly refused. Despite O'Brien's silence, these decisions are governing law. They mandate denial of this motion."

O'Brien timely appealed from the order denying her motion for class certification, which is appealable. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).)

## STANDARD OF REVIEW

“Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying [class] certification.” (*Linder, supra*, 23 Cal.4th at p. 435.) “[I]n the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed ‘unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]’ [citation].” (*Id.* at pp. 435-436.) “‘Any valid pertinent reason stated will be sufficient to uphold the order.’ [Citation.]” (*Id.* at p. 436.)

## DISCUSSION

O’Brien argues on numerous grounds that the superior court abused its discretion by denying her motion for class certification. We disagree.

In order to prevail on a motion for class certification, a plaintiff has the burden of demonstrating “the existence of both an ascertainable class and a well-defined community of interest among the class members.” (*Linder, supra*, 23 Cal.4th at p. 435.) “The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) In particular, a class action for unfair competition based on a fraudulent business practice requires that the defendant “engaged in uniform conduct likely to mislead the entire class.” (*Fairbanks v. Farmers New World Life Ins. Co.* (2011) 197 Cal.App.4th 544, 562.) The record and the case law on which the superior court relied support the court’s determination that O’Brien failed to carry her burden of demonstrating that common questions predominate.

In *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966 (*Cohen*), the plaintiff alleged claims for unfair competition and violation of the Consumer Legal Remedies Act on behalf of a putative class of “‘Residents of the United States of America who subscribed to DIRECTV’s High Definition Programming Package.’” (*Id.* at p. 970.) The plaintiff alleged that “DIRECTV switched its HD channels to a lower ‘resolution,’ reducing the quality of the television images it transmits to its subscribers,” making

DIRECTV's advertising of its HD package false. (*Id.* at p. 969.) The trial court denied class certification on several grounds, including that common issues of fact did not predominate, and the Court of Appeal affirmed. (*Id.* at p. 979.) The court reasoned that "the class would include subscribers who never saw DIRECTV advertisements or representations of any kind before deciding to purchase the company's HD services." (*Ibid.*)

Here, the record supports the superior court's determination that similar analysis applies. As regards the label's reference to an "enclosed design guide," common issues of fact do not predominate, because (1) not all consumers could see that part of the label when purchasing the Set online, and (2) every Set purchased either from Toys "R" Us or from a secondary retailer who obtained it from Toys "R" Us contained a design guide. Thus, some members of the proposed class were not exposed to the "enclosed design guide" representation at all before purchasing the Set, and even among those who were exposed to it, for many of them it was not false or misleading because a design guide was enclosed.

As regards the disclaimer that "[s]ome pictures show pieces not included with this set," common issues of fact do not predominate, because not all consumers could see that part of the label when purchasing the Set online. Thus, some members of the proposed class were not exposed to the disclaimer at all before purchasing the Set.

As regards the label's depictions of the five models, O'Brien has not explained in what way those depictions are misleading, because she has not identified any way in which they are visually distinguishable from models that can be constructed with the pieces contained in the Set. The trial court pressed O'Brien's counsel to identify the difference, but counsel did not do so. O'Brien's briefing on appeal likewise makes no attempt to answer that question. Having reviewed the evidence, and in the absence of any guidance from O'Brien, the trial court determined that the depictions on the label were visually indistinguishable from the models that, according to Hasbro's uncontradicted evidence, can be constructed using only the pieces contained in the Set. We agree. And if the depictions on the label are visually indistinguishable from the

models that can be constructed using only the pieces in the Set, then no consumer could be misled by those depictions—consumers will be able to build what they see on the label. Consequently, with respect to the label’s allegedly misleading depictions of the five models, we conclude that the trial court did not abuse its discretion by determining that O’Brien failed to carry her burden of establishing a community of interest, because she has introduced no evidence that Hasbro “engaged in uniform conduct likely to mislead the entire class.” (*Fairbanks v. Farmers New World Life Ins. Co.*, *supra*, 197 Cal.App.4th at p. 562.)

O’Brien’s argument against application of *Cohen* is not persuasive. O’Brien contends that “[h]ere all class members either looked at The Set’s physical packaging or found The Set on the internet and were exposed to the same false advertising, i.e. label (in store) and/or image of The Set (on the internet) showing the missing connector, and the label (in store) and/or product description (internet) referring to the non-existent ‘design guide.’” The record does not support O’Brien’s argument, because Hasbro’s uncontradicted evidence shows that consumers who bought the Set online were not all exposed to all of the Set’s packaging or even to the same parts of it. Some of the online resellers did not display the part of the label referring to the design guide. Some of the online resellers did not display the part of the label bearing the disclaimer. And, for the reasons we have given, O’Brien has not shown that the label’s depictions of the five models were misleading. We accordingly conclude that O’Brien has failed to show that the superior court’s use of *Cohen* was not a “valid pertinent reason” sufficient to deny class certification (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 656), and we therefore must affirm the court’s order.

DISPOSITION

The order is affirmed. Respondent shall recover its costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.